BRIEF IN SUPPORT OF PETITION

I.

Opinion Below

Opinion by Honorable John E. Miller, Judge of the U. S. District Court, for the Western District of Arkansas, 45 Fed. Supp. 573, Clarence Caldwell v. Travelers Insurance Company, et al.

Opinion of Circuit Court of Appeals, Eighth Circuit, 133 Fed. 2d 649, Travelers Insurance Company v. Caldwell, reversing the District Court.

II.

Jurisdiction

1. The date of the judgment to be reviewed is February 15, 1943. Within the time provided by the rules of the Court of Appeals, for the Eighth Circuit, petitioner filed in that Court its petition for rehearing, same being filed on March 2, 1943, (R. 108). The petition for rehearing was considered and denied on March 15, 1943 (R. 109).

2. The jurisdiction of this Court is invoked under U.S.C.A. Title 28, Section 347 (a), formerly Section 247 of the Judicial Code as amended by the Act of February 3, 1925.

3. The following cases sustain the jurisdiction of this Court:

Erie R. R. Co., Petitioner v. Harry J. Tompkins, 304 U. S. 64.

John G. Ruhlin, et al, Petitioners v. New York Life Insurance Co., 304 U. S. 202.

Industrial Mut. Indemnity Co. v. Hawkins, 127 S. W. 457, 94 Ark. 417.

Hope Spoke Co. v. Maryland Casualty Co., 143 S. W. 85, 102 Ark. 1.

Equitable Surety Co. v. Bank of Hazen, 181 S. W. 279, 121 Ark. 422.

Life and Casualty Co. v. Ford, 292 S. W. 389, 172 Ark. 1098.

Metropolitan Casualty Insurance Co. of New York v. Munford, 126 S. W. 2d 282, 197 Ark. 1041.

American Fidelity & Casualty Co. vs. McKee, 130 S. W. 2d 12, 198 Ark. 601.

New York Life Ins. Co. v. Ashby, 138 S. W. 2d 65, 199 Ark. 881.

III.

Statement of the Case

It is believed that a full statement of the case has been given in the petition under the heading, "Summary Statement of the Matter Involved." In the interest of brevity, therefore, the statement will not be repeated here.

IV.

Specification of Errors

The errors are specified in the petition under the heading, "Reasons Relied on for the Allowance of the Writ".

ARGUMENT

THE CIRCUIT COURT OF APPEALS ERRED IN CONSTRUING THE POLICIES OF INSURANCE INVOLVED HEREIN CONTRARY TO THE EXPRESS PROVISIONS AND LEGISLATIVE INTENT OF THE STATUTES OF THE STATE OF ARKANSAS.

Paragraph "e" of Section 2025 of Pope's (1937) Digest of the Statutes of the State of Arkansas provides: "The Commission shall, at the time of granting a license certificate and as a condition precedent to the granting thereof, require a surety policy or a surety bond, satisfactory to the Commission, in some insurance company or association or other insurer authorized to transact business in this State, **in such sum as the Commission may designate,** for the protection **of all persons,** including passengers, and property resulting from the negligent operation **of such motor vehicle carrier."** (black face ours)

The statutory endorsement which must be written into such insurance policies is then set out, and that endorsement waives all policy defenses as against the public.

Section 13254 of Pope's Digest provides: "All general provisions, terms, phrases and expression used in any statute shall be liberally construed, in order that the true intent and meaning of the General Assembly may be fully carried out."

The only evidence in the record as to the **"requirements"** of the Commission as to the amount of insurance necessary to be carried by the Black and White Transfer

Company, Inc., is the letter (R. 20) of the insurance company to the Corporation Commission enclosing a binder providing $25,000 coverage for one person. In that letter it is said that the binder was being enclosed "in accordance with the requirements of your department." There is nothing in the record to show that the requirement coverage of $25,000 was reduced by the Commission.

It was certainly the intent of the Legislature of the State of Arkansas and the statute expressly provides that the insurance is "for the protection of **all persons** who may be injured or damaged as a result of 'the negligent operation **of such motor vehicle carrier'**".

Yet the Circuit Court of Appeals in its opinion held that the insurance coverage only protected the public of the State of Arkansas **as long as the assured operated strictly pursuant to a certificate of the Arkansas Corporation Commission authorizing operations as a common carrier,** clearly writing into the statute a provision that is not found therein, and which is clearly contradictory to the clear intent and purpose of the Legislature in enacting the provisions of the statute.

The Legislature, in requiring such broad coverage from common carriers, went far beyond the well settled law as declared by the Supreme Court of Arkansas of this State, yet the opinion of the Circuit Court of Appeals even conflicts with the general law applicable in the construction of all ordinary insurance contracts.

> "A contract of indemnity insurance will be construed most strongly against the insurer, and a con-

struction will not be adopted which will defeat a recovery if it is susceptible of a meaning that will permit one." Industrial Mut. Indemnity Company v. Hawkins, 127 S.W. 457, 94 Ark. 417.

"Where the language of a policy of insurance is doubtful or ambiguous, it should be given the strongest interpretation against the insurer which it will reasonably bear." Hope Spoke Co. v. Maryland Casualty Co., 143 S. W. 85, 102 Ark. 1.

Equitable Surety Co. v. Bank of Hazen 181 S.W. 279, 121 Ark. 422.

Life and Casualty Co. v. Ford, 292 S. W. 389, 172 Ark. 1098.

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New York Life Insurance Company v. Ashby, 138 S. W. 2d 65, 199 Ark. 881.

It was held in the last case that "provisions of all insurance contracts should be construed more strictly against insurer, and such constructions should be adopted as will not defeat recovery if it is susceptible of a meaning which will permit recovery."

If the statutory endorsement itself had not been provided for by the statutes of Arkansas, the provisions of paragraph "e" of Section 2025 of Pope's Digest, quoted at length above, would be written into the insurance contract and would be a part thereof.

E. O. Barnett Bros. v. Western Assur. Co., 220 S. W. 465, 143 Ark. 358.

American Liberty Mutual Ins. Co. v. Washington, 36 S. W. 2d 963, 183 Ark. 497.

The findings of fact No. 20 and 21 (R. 74) are entirely supported by the evidence. The findings are as follows:

(20)

"The insured, Black & White Transfer Company, Inc., was in full control of all operations of the Drivers-Owners Association and the driver of the taxicab at the time the injury was received by the plaintiff was under the direction and control of the insured, Black & White Transfer Company, Inc., and was engaged in the business of transporting persons for hire, as well as intrastate freight."

(21)

"That the taxicab which struck and injured plaintiff was at the time being operated by the insured Black & White Transfer Company, Inc., pursuant to a license certificate granted by the Arkansas Corporation Commission."

The driver of the vehicle that injured the petitioner admitted that he was on business for the assured, Black & White Transfer Company, Inc., at the time of the accident.

Q. "You were on business for the Black & White Transfer Company?

A. "Yes, sir." (R. 39)

There is not a single Arkansas case cited by the Circuit Court of Appeals. The case of Trinity Universal Ins. Co. v. Cunningham, 107 F. 2d 857, cited by the Appeal court, supports the contention of petitioner, and was quoted from (R. 81) by the District Court in his opinion.

"It is a general rule of law that an insurance policy must be interpreted to give effect to the intention of the parties so far as that intention can be discovered from the language of the policy and where the meaning of the insurance policy is fairly susceptible of two constructions, it should be construed most strongly in favor of the policyholder."

There is no question but that under the statutory law, as well as the law oftentimes declared by the Supreme Court of Arkansas, the petitioner was entitled to prevail in this case.

In the case of Erie Railroad Company, Petitioner v. Harry J. Tompkins, decided by this Court April 25th, 1938, 304 U. S. 64, it was stated by this Court in the opinion:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

And, in the case of John G. Ruhlin et al., Petitioners, v. New York Life Insurance Company, 304 U. S. 202, it was stated in the opinion:

> "Application of the 'state law' to the present case or any other controversy controlled by Erie R. Co. v. Tompkins does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts."

It is respectfully submitted that this Court should issue a writ of certiorari to the United States Circuit Court of Appeals, in this action.

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